

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION II  
CIVIL ACTION NO. 01-CI-00660

ENTERED  
PETITIONER

JAN 11 2002

HONORABLE PAUL E. PATTON,  
In his official capacity as Governor  
of the Commonwealth of Kentucky

v.

OPINION AND ORDER

FRANKLIN CIRCUIT COURT  
JANICE MARSHALL, CLERK

ROBERT SHERMAN,  
In his official capacity as Director  
of the Legislative Research Commission

and

SUSAN WUNDERLICH,  
In her official capacity as Administrative Regulations Compiler  
of the Legislative Research Commission

RESPONDENTS

\* \* \* \* \*

This matter is before the Court on both parties' Motions for Partial Summary Judgment and on the Respondents' Motion to Dismiss. The Court, having considered the arguments, and being otherwise sufficiently advised, hereby makes the following findings.

I. Motion to Dismiss

Respondents have first moved this Court to dismiss the Governor's Petition on the grounds that it is not a justiciable controversy. Respondents first assert that this matter is a non-justiciable political question. Second, they assert that Governor Patton does not have standing to sue. This Court is not persuaded by either argument. We find that, first, Governor Patton has presented this Court with a justiciable controversy concerning the process by which administrative regulations are promulgated. Furthermore, we cannot agree that whether the Legislative Branch has exceeded its constitutional powers constitutes a non-justiciable political question. See *I.N.S. v. Chadha*, 462 U.S.

919, 943 (1983). Rather, this matter is one reserved for the judiciary. Finally, this Court fully agrees that the Governor has a judicially recognizable interest in the Executive Branch's ability and duty to faithfully execute the law. Therefore, the Governor has standing to bring this action. *See Healthcare Corp. of Ky. v. Humana Health Plan, Inc., Ky.*, 697 S.W.2d 946, 947 (1985). Accordingly, this Court finds that the Governor's Petition must be addressed on the merits.

## **II. Motion for Partial Summary Judgment**

### **A. Background**

Petitioner in this matter, Governor Paul Patton, filed a Petition for Declaratory Judgment, asking this Court to declare specific sections of KRS Chapter 13A unconstitutional. At issue in this Motion for Partial Summary Judgment are 13A.030(2)(a), 13A.032, 13A.100(1)(a), 13A.120(1)(a) and (2)(b), 13A.140, and KRS 13A.333. This Court will address each in its discussion. However, a review of the current regulatory scheme is important before we address the constitutional concerns. To begin, no regulation can become effective until it completes the legislative subcommittee review process established in KRS Chapter 13A. *See* KRS 13A.010(7). First, two separate rounds of public hearings must take place. The first round takes place before an agency files a proposed regulation with the Legislative Research Commission ("LRC"), and the second round takes place after the regulation is filed. After the hearings, the LRC refers the proposed regulation to the Administrative Regulation Review Subcommittee ("ARRS"), where the regulation is considered at another public meeting. After the ARRS makes findings on the proposed regulation, the regulation is referred either to an interim subcommittee with appropriate jurisdiction over the subject matter ("Interim Committee") if the General Assembly is not in session, or to the appropriate standing committees of the House and Senate ("Standing Committees") if the General Assembly is in session.

The statutes permit the ARRS, the Interim Subcommittees, and the Standing Committees to determine whether a regulation is "deficient," as defined in KRS 13A.030(2)(a). Generally, a "deficiency finding" requires a determination that a regulation does not comport with statutory authority or legislative intent. The "deficiency findings" are "nonbinding determinations." Upon a regulation being found "deficient," the agency may either withdraw the regulation, amend it to conform to the findings, or declare the regulation effective notwithstanding the deficiency finding. If the agency chooses the latter, the regulation automatically expires either upon the adjournment of the General Assembly if the determination was by a Standing Committee, or upon adjournment of the next regular session of the General Assembly if the determination was by an Interim Committee. The Governor argues that the deficiency finding by a committee is given the force of law, amounting to a "legislative veto." Therefore, this Court will determine whether the promulgation process involving legislative review violates the Separation of Powers Doctrine of the Kentucky Constitution.

## **B. Discussion**

### **1. KRS 13A.333**

Petitioner, Governor Patton, first submits to this Court that KRS 13A.333 in its entirety is an unconstitutional exercise of the lawmaking power. KRS 13A.333 requires the automatic expiration of a regulation found to be deficient by either a Standing Committee or an Interim Committee. Governor Patton urges that this statute empowers the Standing and Interim Committees to veto administrative regulations without observing the constitutional prerequisites for passage of law, in essence authorizing a "legislative veto." The Respondents assert that the Legislative Branch's delegation of the authority to promulgate regulations to the Executive Branch necessarily



requires the ability to withdraw the delegation. *See LRC v. Brown*, 664 S.W.2d 907, 915 (1984).

KRS 13A.333 requires that once a committee finds a regulation deficient, the regulation automatically expires without any action by the General Assembly. If the deficiency finding is made during a legislative session, the regulation "shall expire" on adjournment of that regular session. KRS 13A.333(1). If the deficiency finding is made during the interim, the measure "shall expire" on adjournment of the next regular legislative session. KRS 13A.333(2). Moreover, when a regulation expires as a result of the committee's deficiency finding, the Executive Branch is prohibited from repromulgating an identical or substantially similar regulation for two years. KRS 13A.333(6).

This Court finds that KRS 13A.333 empowers the Interim and Standing Committees to act with force of law in contravention of the Bicameral, Enactment and Presentment Clauses of the Kentucky Constitution. Ky. Const. §§ 27-28, 46, 56, and 60. In turn, the automatic expiration of a regulation prevents a regulation from having the force of law. *See LRC v. Brown*, 664 S.W.2d at 918. The effect of the automatic expiration is a "legislative veto" of executive actions. This Court finds no distinction in whether the deficiency finding delays the legal effect of a regulation (as with *LRC v. Brown*), or subsequently terminates its legal effect and delays repromulgation. In either instance, the actions of a legislative committee deprive the Executive Branch of its legal effect.<sup>1</sup>

The power to make laws is an awesome power, and the General Assembly can enact statutes on any subject that is not expressly forbidden. Therefore, the Kentucky Constitution constrains the

---

<sup>1</sup> Moreover, this Court is not persuaded by Respondents' argument that the two-year ban is somehow ameliorated by "significant exceptions." KRS 13A.333(6) permits an agency to repromulgate an expired regulation if "required by state law, or federal law or regulation, or court decision." This does not ameliorate the unconstitutionality of the automatic expiration.

lawmaking power through the Bicameral, Enactment, and Presentment provisions. The Constitution also restricts the exercise of lawmaking power by mandating that the process involve full membership of both houses. *See* Ky. Constitution §§ 29, 37, 46, 56, and 60. KRS 13A.333 requires no action by the full General Assembly in order for a "deficient" regulation to expire. Moreover, KRS 13A.333 permits the ARRS and Interim Subcommittees of LRC to exercise this power between regular sessions of the General Assembly. This constitutes impermissible lawmaking power after adjournment of the General Assembly in violation of the Adjournment provisions of the Kentucky Constitution. *See* Ky. Constitution §§ 29, 36, 42; *LRC v. Brown*, 664 S.W.2d at 917. KRS 13A.333 improperly permits a single committee of the legislature to exercise lawmaking power in violation of the mandates of the Constitution.

Finally, this Court is not persuaded that KRS 13A.333 is a legitimate mechanism for the legislature to withdraw its delegation of authority to promulgate regulations. A withdrawal of authority does not eliminate the effect of the legislative veto. The General Assembly is not without recourse when it disagrees with an action of the Executive Branch. It may apply to the courts for judicial review of the legitimacy of an agency action. Or, the General Assembly may, within its own constitutional authority, enact legislation to countermand the Executive action. Accordingly, this Court must conclude that KRS 13A.333 authorizes a legislative veto of agency actions and is therefore void.

## **2. KRS 13A.100(1) and KRS 13A.120(1)(a) and (2)(b)**

Governor Patton next argues that KRS 13A.100 and KRS 13A.120 intrude on powers reserved to the Executive Branch. KRS 13A.100 lists and defines the matters that shall be prescribed by administrative regulations. KRS 13A.120 lists and defines the prohibitions concerning

promulgations of regulations. The Governor relies upon *LRC v. Brown* for support of his argument that the source of the executive duties to promulgate regulations is the Kentucky Constitution, and not enactments of the General Assembly:

The adoption of administrative regulations necessary to implement and carry out the purpose of legislative enactments is executive in nature and is ordinarily within the constitutional purview of the executive branch of government. Ky. Const. Secs. 27-28, 42, 88 and 89.

*LRC v. Brown*, 664 S.W.2d at 919. The source of the Executive Branch's authority to promulgate is the crux of the disagreement between the parties. The Respondents maintain that the authority to promulgate is delegated to the Executive Branch from the Legislative Branch. Therefore, the Respondents assert that KRS 13A.100 and KRS 13A.120 are consistent with administrative law because "[r]egulatory agencies are creatures of statute, and have no powers of their own." *Kerr v. Kentucky State Bd. of Registration for Land Surveyors and Prof'l Eng'rs*, Ky. App., 797 S.W.2d 714, 717 (1990).

This Court believes that the two seemingly conflicting principles can be reconciled. Case law is abundant that "[t]he rule making power of a public administrative body is a delegated legislative power." *Brown v. Jefferson County Police Merit Bd.*, Ky., 751 S.W.2d 23, 25 (1988); see also *Alcoholic Beverage Control Bd. v. Hunter*, Ky., 331 S.W.2d 280, 283 (1960) ("[T]he rule-making power of a public administrative body is a delegated legislative power. . . ."). Section 81 of the Kentucky Constitution charges the Governor with the duty to see that "the laws be faithfully executed." This does not expressly prohibit the Executive Branch from exercising legislative powers when they are so delegated. Moreover, the constitutional authority to execute the laws enacted by the General Assembly does not mean the agencies are free from direction from the Legislative



Branch with respect to the manner in which regulations are promulgated. The actual promulgation of regulations, although necessary for execution of the laws, is indeed an authority delegated by the legislature. *See id.* Therefore, the General Assembly may prescribe the means by which the Executive Branch's discretionary power is restrained. *See Public Serv. Comm'n v. Attorney General*, Ky. App., 860 S.W.2d 296, 298 (1993) and *Miller v. Covington Devel. Auth.*, Ky., 539 S.W.2d 1, 5 n.9. (1976). The General Assembly may then limit the discretionary power of an agency by enacting statutes establishing standards for the promulgation of regulations. *See Kentucky Comm'n on Human Rights v. Barbour*, Ky. App., 587 S.W.2d 849, 851 (1979).

The legislature's decision to require the Executive Branch to operate by way of regulations rather than internal policies does not prevent the Executive Branch from carrying out its obligation to execute the laws. In fact, this Court agrees that KRS 13A.100 codifies the holding in *Kerr* that agencies lack the authority to proceed by way of internal policy absent statutory authorization. *Kerr*, 797 S.W.2d at 717. Accordingly, this court concludes that KRS 13A.100 and KRS 13A.120 provide balance to the discretion of the Executive Branch when promulgating regulations. The statutes permit the Legislative Branch to ensure the agencies' actions are limited to that of administering the law enacted by the General Assembly. Thus, this Court concludes that KRS 13A.100(1) and 13A.120(1)(a) and (2)(b) do not intrude upon the Executive Branch's responsibility to execute the laws.

### **3. KRS 13A.030(2)(a), KRS 13A.032 and KRS 13A.140(1)**

Finally, Governor Patton argues that KRS 13A.030(2)(a), KRS 13A.032 and KRS 13A.140(1) unconstitutionally invade the province of the judiciary. KRS 13A.030(2)(a) provides the standards upon which the ARRS may make a finding of deficiency. While the Governor is

correct that in conjunction with KRS 13A.333 the deficiency finding results in automatic expiration of the regulation, KRS 13A.030(2)(a) by itself merely lists the duties of the subcommittee. A legislative subcommittee's forming of an opinion or factual finding is not, in and of itself, unconstitutional. *See LRC v. Brown*, 664 S.W.2d at 911, 919 n.14. This remains true only when the determination is, as the statute states, **nonbinding**. As this Court has found KRS 13A.333 unconstitutional and void, we find that KRS 13A.030(2)(a) is constitutional inasmuch as it allows the subcommittee to provide research, fact-finding, and general support to the General Assembly. *See id.*

KRS 13A.032 provides that a finding of deficiency on a regulation by a subcommittee establishes a prima facie case of legislative intent in any proceeding involving the validity of that regulation. KRS 13A.032. In addition, KRS 13A.140(1) provides that regulations are presumed valid, and that when a regulation is challenged in the courts the administrative agency bears the burden of proof to show the regulation's validity. KRS 13A.140. This Court agrees that these two statutes purport to dictate to the judiciary how to discharge its duty of judicial review of administrative regulations. Respondents argue that many statutes create presumptions and determine where the burden of proof lies. However, these instances involve legislatively created rights, duties or remedies, not judicial review. Separation of Powers requires that the Legislative Branch must not interfere with judicial review of the coequal branches of government. *See LRC v. Brown*, 664 S.W.2d at 919. Legislation that does so is unconstitutional. *Id.*; *see also Norton v. Commonwealth*, Ky., 37 S.W.3d 750, 754 (2001). This Court finds that KRS 13A.032 and KRS 13A.140(1) violate the separation of powers by interfering with the judicial review. Thus, KRS 13A.032 and KRS 13A.140(1) are unconstitutional and void.

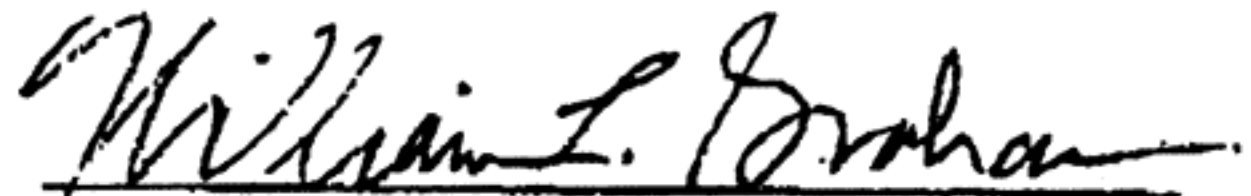


### III. Conclusion

This Court concludes that Governor Patton is correct that KRS 13A.333, KRS 13A.032 and KRS 13A.140(1) are unconstitutional violations of the separations of powers and must be declared void. However, we do not find constitutional violations in KRS 13A.100(1), KRS 13A.120(1)(a) and (2)(b), or KRS 13A.030(2)(a). Those statutes are therefore valid.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner Governor Paul Patton's Motion for Partial Summary Judgment is GRANTED IN PART and DENIED IN PART in accordance with this Opinion and Order. Respondents Robert Sherman and Susan Wunderlich's Motion to Dismiss is DENIED. Respondents' Motion for Partial Summary Judgment is GRANTED IN PART and DENIED IN PART in accordance with this Opinion and Order. THIS COURT HEREBY DECLARES that KRS 13A.333, KRS 13A.032 and KRS 13A.140(1) are UNCONSTITUTIONAL and VOID. Respondents are HEREBY PERMANENTLY ENJOINED from applying KRS 13A.333, KRS 13A.032 and KRS 13A.140(1).

SO ORDERED, this 11 day of Jan., 2002.

  
WILLIAM L. GRAHAM, JUDGE  
FRANKLIN CIRCUIT COURT  
DIVISION II

**DISTRIBUTION:**

**Denis B. Fleming, Jr.**  
**Office of the Governor**  
**100 State Capitol**  
**Frankfort, Kentucky 40601**

**Sheryl G. Snyder**  
**David S. Kaplan**  
**M. Holliday Hopkins**  
**Frost Brown Todd**  
**400 West Market Street, 32<sup>nd</sup> Floor**  
**Louisville, Kentucky 40202-3363**

**Counsel for Petitioner, Governor Paul E. Patton**

**John Schaaf**  
**Thomas M. Troth**  
**Legislative Research Commission**  
**State Capitol Building, Room 300**  
**Frankfort, Kentucky 40601**

**Mark Overstreet**  
**Stites & Harbison**  
**421 West Main Street**  
**P.O. Box 634**  
**Frankfort, Kentucky 40602-0634**

**Counsel for Robert Sherman and Susan Wunderlich**